

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1929

To be argued by
ELLIOT G. SAGOR

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1929

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT C. SELLAROLE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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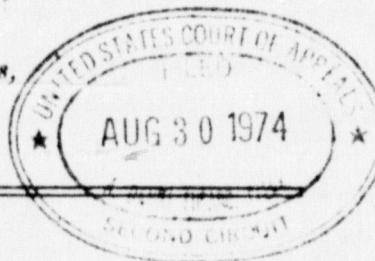


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Preliminary Statement

Robert C. Sellarole appeals from a judgment of conviction entered on June 21, 1974, in the United States District Court for the Southern District of New York, following an eight-day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment 73 Cr. 1114, filed December 12, 1973, charged Robert C. Sellarole and co-defendants Gordon Rodney, James W. Gorab, Herbert Slatin, Johnson O. Lamont and Sheldon J. Zalkin in Count One with conspiring to violate the Travel Act (Title 18, United States Code, Section 1952) with the intent to promote the crime of bribery in violation of the laws of New Jersey.* Count Two charged all six

* N.J.S. 2A:93-6 reads as follows:

"Giving or accepting bribes in connection with government work, service, etc.

[Footnote continued on following page]

defendants with a substantive violation of the Travel Act. Counts Three through Seven charged Sellarole alone with perjury, in violation of Title 18, United States Code, Section 1623.

Each of the defendants except Sellarole entered a plea of guilty to Count One. Sellarole's trial commenced on May 6, 1974, and concluded on May 16, 1974 when the jury found him guilty on Counts 1, 2, 4, 5 and 7, and not guilty on Count Three.*

On May 24, 1974, Rodney, Gorab and Slatin were sentenced to four months imprisonment, and Lamont and Zalkin to two months imprisonment, to be followed by periods of probation.

On June 21, 1974, Sellarole was sentenced to concurrent terms of two years imprisonment on each count and ordered remanded on June 24, 1974, since no appeal was anticipated. On June 28, 1974, Sellarole moved for bail pending appeal, and he was released on his own recognizance upon condition that his appeal be expedited.

Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a [crime]."

* Count Six was dismissed at the close of the Government's case.

Statement of Facts

The Government's Case

The Government proved at trial that Robert C. Sellarole, a Commissioner of the Sewer Authority of Bergen County, New Jersey, received bribes of \$2,050 in cash in return for influencing the deposit of Sewer Authority public funds at the Sterling National Bank and that Sellarole lied under oath to a federal grand jury when he claimed he had neither discussed nor received any such payments. The Government's proof showed that in fact Sellarole received \$800 from James Gorab and \$1,250 from Gordon Rodney, both of whom had received the money from Johnson O. Lamont, an individual who had received a loan from the Sterling National Bank solely because the Sewer Authority funds had been deposited there.*

In 1972 and early 1973, the Bergen County Sewer Authority, which had raised over forty million dollars in public funds by selling bonds to the public, had substantial amounts on deposit in various banks in the form of certificates of deposit. From time to time the certificates of deposit would be "rolled over" or transferred from one bank to another at the direction of Sellarole and the other Sewer Authority Commissioners (Tr. 123; GX 5a, pp. 20-28).**

In the summer of 1972, Gordon Rodney, a construction equipment broker, met Sellarole at Leneve's Restaurant in New Jersey. Sellarole told Rodney that he was a Commissioner of the Sewer Authority and that it was a constant "chore" for him to roll over time deposits. Rodney, taking the bait, volunteered to help ease the burden, and he there-

* Co-defendants Rodney and Gorab testified for the Government, as did Gorab's mother, Jean, who was a conduit for some of the bribe payments.

** "Tr." refers to the trial transcript; "GX" to Government exhibits in evidence; "App." to the appellant's appendix; and "App. Br." to appellant's brief.

after approached James Gorab, a mortgage broker, to assist with this task. Gorab told Rodney that he was sure that he could find assistance in New York City (Tr. 20-27).

Later, in July, 1972, Rodney met again with Sellarole at the Trolley Diner in Hackensack, New Jersey. Rodney told Sellarole that he had met with Gorab and that there would be "fees" involved if the Sewer Authority's money was deposited at the right bank. Sellarole then told Rodney that he wanted to deal only with him, that their dealings were to be in person and that nothing was to be discussed over the telephone. Sellarole gave Rodney a list of Sewer Authority deposits which were due to be transferred to other banks. After the meeting, the list was given by Rodney to Gorab, who, in turn, called Herbert Slatin, a New York City mortgage broker who was to find the bank (Tr. 27-31).

In August, Slatin told Gorab that the fees would be paid through a client of his, later identified as Johnson O. Lamont, who would receive a loan from the bank selected if the bank received a time deposit from the Sewer Authority. Gorab then asked Rodney to find out from Sellarole whether the time deposit could be made at a New York Bank. Rodney in turn determined from Sellarole that it could, provided that the funds were deposited at a favorable rate of interest (Tr. 261-63; GX 15).

Finally, in mid-September, Gorab advised Rodney that a \$2,500 fee could be obtained if one million dollars was transferred to the Sterling National Bank in New York City. Rodney immediately met with Sellarole at Adam's Diner in Saddle Brook, New Jersey, and Sellarole suggested that they split the fee between the two of them. Sellarole was told the fee was coming "from New York" but apparently did not know that the fee would be paid by Lamont. Following this meeting, on September 22, 1972, \$1,000,000 in Sewer Authority funds was transferred from a New

Jersey Bank to Sterling National Bank in New York. The transaction was handled by the co-defendant Sheldon Zalkin, a vice president of the Sterling National Bank, and by Sellarole (Tr. 33-36, 400-08; GX 16, pp. 12-15; GX 17).

After the \$1,000,000 was transferred, Slatin told Gorab that the fee would be \$1,250, not \$2,500, because he had to pay people on his end, and that he could use \$3,000,000 more in transfers. When Gorab informed Rodney of the new terms, they agreed to pay Sellarole a third of \$2,500, and discussed future transfers. On September 28, 1972, Slatin dropped off a \$1,250 check drawn by the co-defendant Lamont and payable to Gorab at an address in New York City, from which it was carried to Gorab in New Jersey by Gorab's neighbor.*

Gorab cashed the check that day at a New Jersey Bank. Shortly thereafter, Rodney, Gorab and Sellarole, together with Sellarole's son, George, met at Laneve's Restaurant. During the conversation, Gorab made a gesture with his hand to his pocket, whereupon George Sellarole and Gorab then went to the men's room, where Gorab gave George \$800 in cash. Upon their return, Sellarole asked George, "Is everything okay?", George said "Yes." Gorab then told Sellarole that he could use \$3,000,000 to \$5,000,000 more in transfers, and Sellarole agreed to work on that. Later, Rodney and Gorab agreed between themselves that from then on they would have to get the fee ahead of time (Tr. 36-41, 298-306).

On October 1, 1972, Gorab got married. At his wedding reception, Gorab told Rodney that, while he was on his honeymoon, one Herbert Olsberg would contact Gorab's mother and would pay \$2,500 for each \$1,000,000 transferred. What Gorab and Rodney did not know was that

* Lamont's check bore the handwritten notation "fee re Sterling National Time Deposit" (GX 15).

Olsberg was an informant for the FBI.* Although Olsberg attended the wedding and was similarly briefed by Gorab, he did not meet Rodney on that occasion (Tr. 44-46, 306-09).

On October 3 and 4, Gorab's mother, Jean, received from Olsberg two checks drawn by Lamont and payable to Gorab, one for \$1,050 and another for \$1,450.** Mrs. Gorab cashed the checks, and, pursuant to prior instructions from her son, called Rodney, who, on October 6, 1972, picked up \$1,875 in cash from Mrs. Gorab and signed a receipt for it (Tr. 48-51, 426-33; GX 2).

A day or two later, Rodney met Sellarole at Adam's Diner in Saddle Brook, New Jersey, where Rodney gave Sellarole \$1,250 in cash in the men's room (Tr. 51-53).

On October 15, Olsberg called Rodney to introduce himself as one of Gorab's associates. The next day, October 16, Rodney, using a pay telephone, briefed Olsberg on the details of the fees he had received and the "individual" with whom he dealt. This conversation Olsberg tape-recorded (Tr. 54-60; GX 3A).

On October 17 Gorab returned from his honeymoon and told Olsberg over the telephone about "paying Sellarole \$800", mentioning Zalkin, Lamont and Slatin. This conversation was also recorded. The following day Gorab had another conversation with Olsberg, also recorded, in which Gorab discussed the fact that he received \$625 *** with re-

* Olsberg infiltrated the conspiracy a couple of months after its inception. He recorded the first conversation with Gorab on September 22, 1973, after the \$1,000,000 transfer had taken place (Tr. 271-89).

** The checks bore the respective notations "re fee time deposit Sterling" and "bal trans C.D. to Sterling". These checks were the advance fee for a proposed second transfer of \$1,000,000 to the Sterling National Bank (GX 21).

*** The difference between the \$2,500 delivered to Mrs. Gorab and the \$1,875 picked up from her by Rodney, \$1,250 of which was given to Sellarole.

gard to the second transfer of \$1,000,000 which had not yet taken place. Gorab assured Olsberg that once Sellarole became chairman of the finance committee of the Sewer Authority it would be easier for him to transfer money (Tr. 311-14; GX 13a, GX 14a).

On October 19 Rodney met with Sellarole and told him about his contacts with an individual, later identified as Olsberg, who was interested in \$5,000,000 in transfers in addition to the \$3,000,000 or more which Sellarole was working on for Sterling National Bank (Tr. 62-65). Rodney told Olsberg about this conversation later that day, and Olsberg dutifully recorded what Rodney said.

On October 31, 1972, Rodney introduced Sellarole to Olsberg for the first time. Rodney told Sellarole that "Herb here is . . . my man in New York . . . very simply on the transfers we can all work together . . ." Sellarole agreed, telling Olsberg that they had constant roll overs, that there were some big ones he was responsible for, and that a \$1,000,000 transfer and others could be expected soon. All of this was, of course, recorded (Tr. 68-70, 118-25; GX 5a, pp. 28-30).

In late October or early November 1972, Gorab met with Sellarole at the Marriott Motor Lodge in Saddle Brook, New Jersey, to discuss the fact that the \$1,000,000 would have to be transferred soon to the Sterling National Bank for the \$2,500 fee paid in early October (Tr. 314-316).

On November 9, 1972, Rodney, Olsberg and Sellarole had a conversation, duly recorded, in which they discussed the \$1,000,000 to be transferred to Sterling National Bank, a possible transfer of \$5,000,000 to a Long Island Bank with which Olsberg allegedly was associated, and the receipt of "up front" fees on the \$5,000,000 deal (Tr. 75, 125-38; GX 6b).

On November 13, 1972, Sellarole again met with Rodney and Olsberg, who recorded their conversation. Sellarole told them that he was "annoyed with Jimmy Gorab over apparent pressure that Jim Gorab had been putting on him to get the million dollars transferred to the Sterling Bank and [Sellarole] . . . offered to him [Gorab] to give the \$1,250 back" (Tr. 73; GX 7a).

Finally on January 16, 1973, Olsberg recorded a telephone conversation with Sellarole in which they discussed the second \$1,000,000 transfer, which still had not taken place (GX 10a).*

On March 13, 1973, Sellarole appeared at the United States Attorney's Office. After being advised of his rights, he was questioned by an Assistant United States Attorney. Later that day he appeared before the Grand Jury and swore that he had never discussed or received any fees for the depositing of Sewer Authority money in the Sterling National Bank (GX 16).

Two days after he appeared before the Grand Jury, Sellarole told Rodney that it would be a good idea to get in touch with Olsberg "to get our stories together and get them straight so that nobody would be saying that there were fees". Later that night Rodney told Olsberg, in a recorded conversation, that "we got it planned and I think we got [it] under control but we don't have it under control without you" (Tr. 80; GX 9a).

On March 17, 1973, Rodney, Sellarole and Frank Riviello, a business associate of Sellarole, visited the home of Adolph Galluccio, Esq., who subsequently represented

* The recorded conversations of October 31, November 9 and November 13, 1972, and January 16, 1973 controvert Sellarole's testimony in the Grand Jury, portions of which were the basis for the perjury counts, that he never discussed fees or transfers with Rodney or Olsberg and never received any fees.

Sellarole at trial. According to Rodney, who was not represented by Galluccio, Sellarole told Galluccio in Rodney and Riviello's presence that he had received \$800 and then \$1,250 in connection with the transfer of time deposits (Tr. 84-90, 1066).*

The Defense Case

Sellarole, who testified, denied participation in any scheme to receive a bribe. He admitted arranging for the \$1,000,000 transfer to Sterling, but stressed that the certificate of deposit was invested at a high rate of interest. He further admitted meeting with Gorab and Rodney on September 28 at Laneve's Restaurant, but denied that his son had ever received any money from Gorab. He also denied ever receiving \$1,250 cash from Rodney at Adam's Diner in October 1972; rather, he claimed that he received \$1,250 from Olsberg on November 10 in New York for an unrelated mortgage deal involving one Caesar Vitale. Sellarole further denied that he ever made any admissions on March 17 to his lawyer and claimed that Riviello was not present at that meeting (App. 148a-61a).

On cross-examination Sellarole admitted that he never told the tax preparer for his 1972 return about the allegedly lawful \$1,250 fee he received from Olsberg. He claimed that the references to the various dates and amounts in the recorded conversations with Olsberg referred to mortgage deals he had with Olsberg and not to transfers of Sewer Authority funds. For example, he attributed his reference to receiving \$1,250 on the November 13 recording to a \$1,250 lawful fee he allegedly received from Olsberg on November 10, which he claimed was deposited in the Interchange State Bank. He further explained that the refer-

* Neither side called Riviello as a witness. It was stipulated that if Galluccio were called as a Government witness, he would testify that "he does not remember whether or not . . . Riviello was present . . . on March 17 . . ." (Tr. 1044; GX 34).

ence to "up front" in the recording of November 9 referred to interest rates, and not to fees paid in advance. In addition, Sellarole said he called Olsberg in New York from his office in New Jersey a couple of times in October, 1972 in connection with the mortgage deals (Tr. 613-17, 659-64, 677, 679).

Sellarole's son, George, testified that he had been at Laneve's restaurant on the 28th, but that he had never received any money from Gorab (App. 136a-43a).

The Government's Rebuttal

Herbert Olsberg testified that he did not meet Sellarole in New York on or about November 10 and never gave him \$1,250. He also testified that the November 13 conversation concerning \$1,250 referred to money Rodney gave to Sellarole back in October (App. 177a-78a; Tr. 872).

The Government also introduced records of the Interchange State Bank which revealed that the \$1,250 in cash Sellarole claimed to have received and deposited on or about November 10, 1972 had not been deposited there; however, the records did reveal a \$2,000 cash deposit on September 29, the day after the \$800 was passed to Sellarole's son at Laneve's Restaurant (GX 26).^{*} Sellarole's telephone toll records were also introduced which showed there were no calls to Olsberg prior to October 31, 1972 (GX 27 and 27a).

Finally, expert testimony was introduced to explain that the term "up front" refers to a "fee paid to a person . . . for their services . . ." and has nothing to do with the rate of interest, as claimed by Sellarole (App. 201a).

^{*} There were no other deposits in the account for October and November.

Defendant's Surrebuttal

Sellarole testified that the \$2,000 cash he deposited on September 29 was from a \$5,500 business check he cashed the previous day. On cross-examination, he further explained that he gave Riviello \$3,500 in cash the next day and deposited \$2,000 "to pay household expenses". The \$5,500 business check was never produced or subpoenaed (Tr. 1056-69).

ARGUMENT

POINT I

Sellarole's claim that Judge Weinfeld, the jury, and defense counsel were duped by the Government into believing that the Sterling National Bank actually paid the bribes is preposterous.

Sellarole claims, on the basis of one sentence in the Government's opening, that the Government "duped" everyone in the Courtroom into believing that the Sterling National Bank made the bribe payments to Sellarole. His claim is both irrelevant and preposterous.

The evidence at trial established a scheme pursuant to which Sellarole caused the transfer of Sewer Authority money to the Sterling National Bank, where, as a result, Zalkin made loans to Lamont, who furnished the money to make the bribe payments to Sellarole for the transfer. The indictment charged, and the Government's proof at trial established, the criminal participation of Zalkin, and therefore of the Sterling National Bank, in the scheme, but it was never claimed that Zalkin or the Bank had directly paid off Sellarole. Rather, the indictment (paragraph 12) charged that Slatin and Lamont furnished the bribe payments and that Zalkin agreed to make the loans to Slatin and Lamont if Sewer Authority moneys were deposited in the Sterling

National Bank. Through Gorab's testimony, the Government established that Slatin had told Gorab that he "... had a client ... [and] if they could get a time deposit stuck in the bank, they would be assured of a loan and for this *they* would pay us a fee" (App. 91a). The Government also put in evidence Lamont's cancelled checks, which were the source of the bribe payments. These checks were handed to the jury and referred to by the prosecutor in his summation and by Judge Weinfeld in his charge (App. 255a-256a).

Sellarole fastens on one superfluous sentence in the prosecutor's opening—that after Gorab contacted Slatin "... they learn the Sterling Bank of New York, where Mr. [Zalkin] is the vice president, is willing to or through people in New York, give a commission ..." (App. 29a). Upon this single phrase is based a claim that the Court, the jury and defense counsel were misled into thinking the payments came from the bank itself, rather than originating with Lamont.* The evidence, of course, made clear that the money came from Lamont and Slatin, with whom Zalkin was shown to be acting in concert. The prosecutor's statement, in light of the evidence, could not have misled anybody.

Finally, whether or not Sellarole knew the actual source of the fees "from New York" is entirely irrelevant since he was charged with receiving part of the fees with corrupt intent. Whether the money came from the Bank or Zalkin, from Lamont, or from Gorab and Rodney, it was illegal for Sellarole to accept money in return for placing Sewer Authority deposits in the Sterling National Bank.

* Judge Weinfeld can hardly have been "duped" about Zalkin's role. When he pleaded guilty, Zalkin, who did not testify at trial, told Judge Weinfeld that "a million dollars in funds had been deposited in my bank, and after which these deposits had been made by the Bergen County Sewage Authority, I had learned the defendants Lamont and Slatin had had to pay off public officials with bribes. I facilitated loans to Lamont and Slatin to possibly assist them with paying off this—these bribes" (Transcript of March 26, 1974, p. 8).

POINT II

The indictment more than sufficiently sets forth the crimes charged.

Sellarole apparently claims that the indictment should be dismissed because the proof at trial was at variance with the facts alleged in the indictment, and that he was so misled by the indictment that he could not defend against the proof. The argument is based upon a misunderstanding of the requisites of a criminal pleading and upon a distortion of the record.

The indictment more than sufficiently alleged a conspiracy to violate, and a substantive violation of, the Travel Act. *United States v. Zirpolo*, 288 F. Supp. 993 (D. N.J. 1968), *reversed on other grounds*, 450 F.2d 424 (3d Cir. 1971); *United States v. Kenny*, 462 F.2d 1205, 1213-15 (3d Cir. 1972). See *United States v. Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973). Moreover, Sellarole never moved to dismiss the indictment, never demanded a Bill of Particulars and never sought a continuance on the grounds that he had been confused by the indictment.

As to the proof at trial, the record reveals that the Government proved exactly what was charged in the indictment. Sellarole's defense was that the bribe payments never were made. Neither side introduced any evidence of a conspiracy . . . "among Gorab, Slatin, Lamont and Government informer Olsberg to dupe Sterling National Bank into making a loan to Lamont by a complex series of transactions calculated to deceive appellant and Zalkin . . ." as Sellarole now claims (App. Br. 38-39).

POINT III

Sellarole's admissions to his lawyer made in the presence of Rodney and Riviello are not protected by the attorney-client privilege.

Sellarole contends that Judge Weinfeld improperly allowed Rodney to testify to admissions made by Sellarole to his lawyer in the presence of Rodney and Riviello. His claim is without merit.

Gordon Rodney testified at trial that on March 17, 1973, at a meeting at the home of Adolph Galluccio, Sellarole's trial counsel, at which he, Sellarole, Galluccio and a business associate of Sellarole, Frank Riviello, were present, Sellarole admitted that two fees had been paid to him in connection with a transfer to the Sterling National Bank that had been made and a second that had been proposed but not made. No claim was made by the defense at the time that Rodney was present to prepare a joint defense or that Riviello was not present. Hence, since the presence of third parties Rodney and Riviello destroyed any claim of confidentiality, the testimony was properly received. *United States v. Andreadis*, 234 F. Supp. 341, 345 (E.D. N.Y. 1964); 8 Wigmore, Evidence § 2326 (McNaughton rev. 1961).

Sellarole now claims that Rodney was present at the meeting to prepare a joint defense. The record is, however, entirely devoid of any support for that assertion.* He also

* An examination of pages 86-90 of the transcript, upon which Sellarole relies, reveals that in fact Rodney testified that he was not represented by any counsel, including Galluccio, at the time (Tr. 88). Further, even on Sellarole's version of the facts, at the outset of the meeting Galluccio told Rodney he could not represent him because there was a conflict (App. 160a).

claims, as he did when he testified himself at the trial, that Riviello was not even present at the meeting. But neither side called Riviello to testify, and Sellarole's testimony was not even supported by his own attorney at trial, who was present at the meeting.*

POINT IV

The trial judge properly instructed the jury that in proving the perjury charges the Government is not required to prove its case by any particular number of witnesses.

Sellarole argues that Judge Weinfeld committed error in failing to instruct the jury as to the so-called "two witness" evidentiary rule in perjury cases. Subsection (e) of Section 1623, under which he was indicted, provides, "It shall not be necessary that such proof of perjury be made by any particular number of witnesses or by documentary or other type of evidence." Its purpose was to repeal the two witness rule. See H.R. 91-1549, 1970 U.S.C. Cong. and Admin. News 4007, 4008.

POINT V

The questions supporting the perjury convictions were capable of eliciting answers the defendant knew to be false.

Sellarole claims that the questions supporting his perjury convictions are either vague or ambiguous. His arguments are without merit. Question 1 of Count Four, contrary to Sellarole's contention, does not relate to "loan-

* Galluccio did not take the stand at the trial. His stipulated testimony as a Government witness on rebuttal was that he did not remember one way or the other whether Riviello was also present (page 9, *supra*).

ing" Sewer Authority funds, which would not make any sense, but to loans by the Sterling National Bank. Obviously the Sewer Commission was not loaning money, particularly "to any persons connected" with Sellarole (Count 4, question 1; App. 17a). Sellarole's negative responses to questions 2 and 3 under Count 4 were similarly perjurious: "Was there any discussion about any fee to be paid to any person in connection with the placing of this certificate of deposit?" and "Was there any fee paid to any person, to your knowledge, in connection with the placing of this certificate of deposit?" (App. 17a). Under applicable standards the questions were of sufficient clarity to elicit from Sellarole answers he knew to be false. See *United States v. Winter*, 348 F.2d 204 (2d Cir. 1965); *United States v. Cobert*, 227 F. Supp. 915, 917 (S.D. Cal. 1964).

Sellarole maintains that some of his answers to questions under Count 4 were technically true, and therefore he could not be convicted. The first series of questions in Count 5 related to background material, the answers to which were not in issue, as the Government told the Jury in summation (Transcript of Summation pp. 8-9). However, the subsequent questions in Count 5 related to Sellarole's perjurious denial of conversations with any person concerning the transfer of a second \$1,000,000 certificate of deposit to Sterling. The recorded conversations of October 31, November 9, and 13, according to Rodney and Olsberg, all related in part to conversations on this subject. As Judge Weinfeld correctly charged the jury, it is not necessary for the government to prove that each fact or statement in a perjury count be false. It is sufficient to convict if at least one factual statement in the count under consideration is false (App. 251a).

Finally, Sellarole suggests with regard to Count Seven that his denial of ever discussing "investing funds" with Olsberg was "technically correct", because, he claims, the Sewer Authority's placement of funds in a bank would not

be called an "investment". The argument is utterly frivolous. That Sellarole understood such a placement of funds to buy certificates of deposit to be an "investment" is underscored by Sellarole's testimony at the trial. His direct examination included the following colloquy:

"Q. As a member of that Commission, do you have any responsibility towards *investing Sewer Authority funds*? A. Yes.

Q. And how are *funds of the Sewer Authority invested*? A. In various areas—federal paper, treasury certificates and *certificates of deposit*.

Q. Now, *specifically with certificates of deposit*, where did you get the money to buy certificates of deposit? A. The *money is invested* in these various types of accounts . . ." (App. 144a; emphasis supplied).

POINT VI

Sellarole was properly called to testify before the Grand Jury.

Sellarole contends, in effect, that the Government wrongfully called upon him to testify in the Grand Jury because he was under investigation. He also claims that he should have been advised of the provisions of the "use immunity" statute, Title 18, United States Code, Sections 6002-6003. His arguments are meritless.

On March 13, 1972 Sellarole, pursuant to the request of agents of the F.B.I., voluntarily appeared at the United States Attorney's Office (Tr. 594-95). Thereafter, he appeared before the Grand Jury, where he was advised of his right against self-incrimination and right to counsel prior to testifying (GX 16, pp. 2-3).^{*} There was no impropriety

^{*} Sellarole contends that he should have been taken before a Commissioner who would have advised him of his rights, citing Rule 5(a), F. R. Cr. P. However, that rule relates to persons arrested, which Sellarole clearly was not.

in calling him before the Grand Jury. *United States v. Wolfson*, 405 F.2d 779, 784-785 (2d Cir. 1968).

In support of his argument that federal law should follow New York State in conferring "automatic immunity for a person subpoenaed before a grand jury", Sellarole cites *People v. Steuding*, 6 N.Y. 2d 214, 189 N.Y.S. 2d 166 (1959). However, "whatever may be the rule in the State of New York, the Fifth Amendment does not proscribe the practice here inveighed against." *United States v. Winter*, 348 F.2d 204, 207 (2d Cir.), cert. denied, 382 U.S. 955 (1965). Moreover, Sellarole had no "right" to immunity under 18 U.S.C. §§ 6002-6003,* and therefore there was not even an arguable duty on the prosecutor to discuss the statute with him.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
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Elliot G. Sagar

ELLIOT G. SAGOR,
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* See *Kastigar v. United States*, 406 U.S. 441 (1972).

AFFIDAVIT OF MAILING

State of New York
County of New York }

MILARED ROTHENBERG

being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the **30th** day of **August**, 1974
he served a copy of the within **BRIEF**
by placing the same in a properly postpaid franked
envelope addressed:

FRANK LOPEZ, Esq.
31 SMITH ST.
BROOKLYN, N.Y.

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

[Signature]

Sworn to before me this

30th day of **August**, 1974

[Signature]

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975

